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March 8, 2012

By Facsimile

Honorable Theodore H. Katz,
United States Magistrate Judge,
Daniel Patrick Moynihan U.S. Courthouse,
500 Pearl Street,
New York, New York 10007.

Re: *Anwar* v. *Fairfield Greenwich Ltd.*, No. 09-CV-118 --
Headway Investment Corp. v. American Express Bank Ltd.

Your Honor:

I write on behalf of the Standard Chartered Defendants in response to the March 5, 2012 letter from plaintiff Headway Investment Corporation ("Headway"). Headway's objections to the deposition of non-party Cyma Group, Inc. ("Cyma"), through Cyma's president, Carlos Gonzalez, are unfounded. Cyma has been properly summoned to a deposition, and the deposition should be permitted to proceed as noticed and without preconditions.[1]

Headway asks the Court to force Standard Chartered to take the deposition of Mr. Gonzalez as a "representative" of Headway pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. There is no authority for this request, and in any event Mr. Gonzalez would not be a proper Headway "representative."

First, Standard Chartered already has noticed, pursuant to Rule 30(b)(1), the depositions of Headway's president and three other authorized signatories to the accounts at American Express Bank International ("AEBI") through which Headway purchased shares of Fairfield Sentry Ltd. ("Sentry") and Fairfield Sigma Ltd. ("Sigma").

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[1] Although Headway has no standing to object to this non-party deposition, Standard Chartered nevertheless wishes to address the arguments that Headway has made. *Freydl* v. *Meringolo*, 2011 WL 1226226, at *1 (S.D.N.Y. Mar. 25, 2011) ("'In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness.'") (quoting *Langford* v. *Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir.1975)).

In addition, as this Court is aware, last November Standard Chartered noticed the deposition of Headway's sole shareholder, beneficial owner and former president, Mr. German Sanchez. Headway refused to procure Mr. Sanchez for a deposition (or even search his files for relevant documents). Mr. Sanchez passed away while vacationing last month, and his testimony is forever lost. Although these events have foreclosed to Standard Chartered a critical source of discoverable evidence, Headway provides no authority for its proposition that a Rule 30(b)(6) deposition is the exclusive vehicle by which Standard Chartered can depose Headway's representatives. In fact, Rule 30(b)(6) expressly states just the opposite—*i.e.*, the availability of a Rule 30(b)(6) deposition "does not preclude a deposition by any other procedure allowed by these rules."

Second, Standard Chartered has no intention of deposing Mr. Gonzalez more than once, absent the good cause required by the Second Amended Scheduling Order Regarding Standard Chartered Cases. Cyma is a non-party "management consultant retained by Headway" to provide advice with regard to Headway's "investment activities." (Headway Letter at 1-2) On December 6, 2011, Standard Chartered issued a subpoena to Cyma pursuant to Rules 45 and 30(b)(6), seeking documents and testimony about (among other things) (i) Cyma's relationship with Headway and Mr. Sanchez, (ii) Headway's Sentry and Sigma investments and (iii) the allegations made in Headway's complaint. Mr. Gonzalez, who is the President of Cyma, was designated as Cyma's corporate representative, and his deposition is scheduled for March 13, 2012. Standard Chartered intends to elicit all appropriate testimony from Mr. Gonzalez based on his knowledge and experience as Headway's management consultant, and thus there is no legitimate concern about taking Mr. Gonzalez's deposition twice for no good reason.

Third, even if Standard Chartered were to notice Headway for a deposition pursuant to Rule 30(b)(6), Mr. Gonzalez would not be "the natural designee," as Headway insists. (Headway Letter at 1.) Headway and Cyma are not the same thing, and Mr. Gonzalez would have a clear conflict of interest testifying as a representative of both Cyma and Headway. The sole document that Cyma produced in response to Standard Chartered's subpoena, a January 2005 "Consulting Agreement" between Cyma and another company controlled by Mr. Sanchez, Publisher Promotions, Inc. ("PPI"), confirms this. The Consulting Agreement reflects that Mr. Gonzalez and Cyma agreed to manage Mr. Sanchez's investments through Headway and other of Mr. Sanchez's investment vehicles. In particular, the Consulting Agreement provides that Cyma would:

> Subject to the supervision of PPI, oversee designated investment managers of the Entity's [including Headway's] portfolios, and assist PPI in defining its asset allocation and the components of such portfolios and monitor the performance thereof, in accordance with the PPI's purposes

> and investment objectives as expressed by PPI to CYMA from time to time.

(Consulting Agreement at p. 2, ¶ 2(h).)[2] In return for such services, Cyma (and therefore its principal, Mr. Gonzalez) was paid a "minimum annual fee" of $480,000, in addition to such other amounts to be agreed upon by Cyma and PPI. (*Id.* ¶ 3.) Stated simply, Mr. Gonzalez received at least $480,000 per year to provide investment advice during the very time period in which Headway invested in Sentry and Sigma and suffered the losses for which Headway seeks compensation from Standard Chartered in this action. Indeed, unlike AEBI or Standard Chartered, Mr. Gonzalez apparently had some discretion over Headway's investments, including those made through accounts at AEBI.[3] Because Headway retained Mr. Gonzalez's company as an outside consultant, paid him for investment advice, and presumably made investment decisions based on his recommendations, Mr. Gonzalez cannot testify as the corporate representative of both his own company and Headway.[4]

In short, Standard Chartered has properly summoned Cyma to testify, and likewise has properly noticed depositions of individual Headway witnesses. The deposition of Mr. Gonzalez—which already has been deferred and rescheduled to accommodate Headway—should proceed as scheduled on March 13, 2012. There is no basis to force Standard Chartered to notice a deposition of Headway pursuant to Rule 30(b)(6) or to limit Standard Chartered's ability to take testimony from appropriate

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2 Despite Standard Chartered serving Headway with requests in March of last year calling for it and other documents, Headway did not produce this agreement in discovery, nor has it produced any documents showing the "purposes and investment objectives" that PPI and Sanchez adopted for Headway. Headway did not identify the PPI in its Rule 26 disclosures or in response to Standard Chartered's interrogatories.

3 Although not dispositive to the issue currently before the Court, documents produced to date indicate that Mr. Gonzalez and Cyma may be necessary parties as defendants in this action pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, as both have interests in this litigation while their absence may leave Standard Chartered subject to a substantial risk of incurring the obligations of Mr. Gonzalez and/or Cyma.

4 Headway's assertions that Standard Chartered previously agreed to notice Headway for a Rule 30(b)(6) deposition and accept Mr. Gonzalez as Headway's Rule 30(b)(6) designee are incorrect. Standard Chartered stands ready to provide the Court with the relevant email exchanges between counsel for the parties if that will be of assistance to the Court.

fact witnesses. Standard Chartered respectfully asks that the Court deny Headway the relief it seeks.

Sincerely,

Diane L. McGimsey

cc: Jorge Mestre, Esq.

Alan H. Rolnick, Esq.
(via E-mail)

Erimar von der Osten, Esq.
(via E-mail)

Jose Ortiz, Esq.
(via E-mail)

Plaintiffs' Steering Committee
(via E-mail)

The deposition of Mr. Gonzalez may proceed on March 13, 2012. The Court assumes that Mr. Gonzalez will be deposed only one time.

3/8/12

SO ORDERED

THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE